

**Before the
Federal Communications Commission
Washington, D.C. 20554**

RECEIVED

AUG 16 2000

In the Matter of)

Service Rules for the 746-764 and)
776-794 MHz Bands, and Revisions)
to Part 27 of the Commission's Rules)

Carriage of the Transmissions of)
Digital Television Broadcast Stations)

Review of the Commission's Rules)
and Policies Affecting the Conversion)
to Digital Television)

WT Docket No. 99-168

CS Docket No. 98-120

MM Docket No. 00-83

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: The Commission

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS
ON THE FURTHER NOTICE OF PROPOSED RULEMAKING**

The National Association of Broadcasters ("NAB")¹ submits these comments in response to the Commission's *Further Notice of Proposed Rulemaking* in this proceeding.² In the *First Report and Order* in this proceeding,³ the Commission adopted licensing and service rules for the commercial spectrum located in the 700 MHz band, which was previously reallocated from its exclusive use for television broadcasting on channels 60-69. Specifically, the *First Report*

¹ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

² *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 99-168, CS Docket No. 98-120 and MM Docket No. 00-83, FCC 00-224 (rel. June 30, 2000) ("*Memorandum Opinion*" and "*Further Notice*").

³ *First Report and Order* in WT Docket No. 99-168, FCC 00-5 (rel. Jan. 7, 2000) ("*First Report*").

established license bands that can be used for a variety of wireless services, and set forth competitive bidding rules governing the auction of these bands. In addition, in the *First Report* (at ¶ 145), the Commission determined to “consider specific regulatory requests needed to implement” agreements between incumbent broadcast licensees and new wireless licensees in the 700 MHz band.

NAB filed a petition seeking reconsideration of the Commission’s decision in the *First Report* to consider arrangements that facilitate new licensees’ use of the 700 MHz band through the premature cessation of analog television service on channels 59-69. The Commission ultimately disagreed with NAB’s position, and affirmed its authority to approve regulatory requests necessary to implement agreements facilitating use of the 700 MHz band by new wireless licensees, but emphasized that it was addressing only *voluntary* agreements between broadcasters and auction winners. See *Memorandum Opinion* at ¶ 53.

Beyond reaffirming its authority to approve arrangements advancing new licensees’ use of the 700 MHz band during the DTV transition, the Commission also sought comment on additional steps it “can take to facilitate the band-clearing process.” *Further Notice* at ¶ 81. First, the Commission requested comment on the need for cost-sharing rules that would spread the cost of band clearing among the 700 MHz licensees that benefit from the process. Second, the Commission asked for comment on additional voluntary band-clearing mechanisms – such as “three-way” agreements and “secondary auctions” – that would provide alternatives to individually negotiated agreements between new licensees and incumbent broadcasters in the 700 MHz band.⁴

⁴ “Three-way” agreements would involve new 700 MHz licensees, incumbent television broadcasters on channels 59-69, and broadcasters with operations on lower channels, particularly those in the “core” spectrum (channels 2-51). Under these agreements, a broadcaster with an allotment on a lower channel would voluntarily free up one of its channels for relocation by a

As described in detail below, NAB opposes any mandatory relocation of incumbent broadcasters operating in the 700 MHz band, even if voluntary agreements do not result in the clearing of incumbent broadcasters from the 700 MHz band prior to the end of the DTV transition. Further, NAB agrees with the Commission that mandatory cost-sharing rules are inappropriate.

I. Mandatory Clearing of Broadcasters from the 700 MHz Band Would be Contrary to Congressional Intent and the Public Interest, if it Results in the Premature Loss of Analog Television Service.

Section 309(j)(14)(A) of the Communications Act requires reclamation of the channels that broadcasters now use for transmission of analog television service by no later than December 31, 2006. 47 U.S.C. § 309(j)(14)(A). Congress recognized in adopting Section 309(j)(14), however, “that not all consumers and broadcast stations will convert to the new digital television service format at the same time.” H.R. REP. NO. 217, 105th Cong., 1st Sess. 576 (1997). To “*ensure* that a significant number of consumers in any given market are not left without broadcast television service as of January 1, 2007,” Congress adopted Section 309(j)(14)(B) of the Communications Act “which *requires* the Commission to grant extensions [of the 2006 target date] to any station in any television market if any one of . . . three conditions exist.” *Id.* at 576-77 (emphasis added).⁵ In addition, Section 337(d)(2) of the Communications

broadcaster operating on channels 59-69. In a “secondary auction,” competitive bidding would be used to determine the price that would be paid by new 700 MHz licensees to television incumbents who agree to clear their channels in the 700 MHz band. Such an auction could be conducted by the Commission or on a private basis.

⁵ This section specifies that broadcasters will be permitted to keep their channels for analog television service beyond 2006 if: (i) one or more of the largest television stations in a market do not begin DTV transmission by the 2006 target through no fault of their own; (ii) digital-to-analog converter technology is not generally available in a market; or (iii) fewer than 85% of the television households in a market are able to receive digital television signals (either off the air or through a cable-type service that includes DTV stations). 47 U.S.C. § 309(j)(14)(B).

Act requires the Commission to establish additional technical restrictions needed “to protect full-service analog television service and digital television service during a transition to digital television service.” 47 U.S.C. § 337(d)(2). The terms of Sections 309(j)(14) and 337(d)(2), and the legislative history of those provisions, therefore make clear Congress’ intention to “ensure” that existing analog television service will continue without interference until certain specified statutory conditions were met. H.R. REP. No. 217, 105th Cong., 1st Sess. 576 (1997). Indeed, the Commission recognized in its *Memorandum Opinion* (at ¶ 46) that Section 309(j)(14) “entitles a broadcaster to request and receive an extension of the 2006 transition deadline” if it is operating in a market with low DTV penetration. (emphasis added)

Given this statutorily-recognized right of broadcasters to continue their analog television service on all channels (including 59-69) even beyond 2006, NAB opposes the suggestion of some parties that the Commission “consider steps other than the review of voluntary agreements” to facilitate clearing of the 700 MHz band. *Further Notice* at ¶ 92.⁶ Regardless of “whether reliance on voluntary agreements will be adequate” to clear the 700 MHz band (*Further Notice* at ¶ 92), any effort by the Commission to mandate the clearing of incumbent broadcasters by forcibly relocating them to other channels or by other methods would be contrary to clear congressional intent. In this regard, three Commissioners have expressly stated that they oppose any mandatory relocation of incumbent broadcasters.⁷ NAB agrees with these Commissioners that incumbent broadcasters cannot be compelled to participate in any “three-way” agreements or “secondary auctions” that would result in their forced relocation.

⁶ For example, Spectrum Exchange previously proposed a secondary auction scheme involving the forced relocation of “holdout” broadcasters who declined to clear from channels 59-69. *See* Petition for Rulemaking of Spectrum Exchange Group, LLC at 11-13 (April 24, 2000).

⁷ *See Further Notice*, Separate Statements of Commissioners Ness, Furchtgott-Roth and Tristani.

Indeed, because Congress has already determined that the public interest would best be served by the continuation of analog television service until specific statutory conditions have been fulfilled, the Commission lacks the discretion to conclude that the public interest would be better served by use of the 700 MHz band by new licensees. NAB believes that inviting “three-way” agreements may only exacerbate this violation of congressional intent. Some parties supporting the relocation of incumbent broadcasters on channels 59-69 have baldly stated, citing no factual support, that most viewers of channels 59-69 receive the signals through cable systems or direct broadcast satellite, so early clearing of those channels would have little impact on television viewers.⁸ But three-way agreements would also involve broadcasters with operations on lower channels (particularly those in the “core” spectrum of channels 2-51) vacating their channels for relocation by incumbents on channels 59-69. Under such arrangements, viewers of stations on channels 2-51 would lose their free, over-the-air television service, including viewers least able to afford a subscription television service and who are therefore the most dependent on free, over-the-air service. While the Commission has requested comment on approving “voluntary” three-way agreements (whether arrived at through individual negotiations or a secondary auction), NAB points out that such “voluntary” agreements will inevitably result in “mandatory” reductions in service for the viewing public. And NAB asserts that such a result is clearly contrary to Congress’ intent to ensure the continuation of existing analog television service during the DTV transition.⁹

⁸ See *Opposition of Spectrum Exchange to Petitions for Reconsideration* at 2 (March 10, 2000).

⁹ NAB also doubts that the Commission has statutory authority to itself conduct secondary auctions. As the Commission has recognized since the inception of its competitive bidding authority, Section 309(j) “expressly limits our authority to use competitive bidding to the award of ‘initial’ licenses or construction permits.” *Second Report and Order*, 9 FCC Rcd 2348, 2350 (1994). Under this plain language of Section 309(j), the Commission would appear to lack the authority to conduct an auction of “contractual options.” *Further Notice* at ¶ 100.

II. The Implementation of Three-Way Agreements and Secondary Auctions Raises Numerous Technical and Practical Difficulties.

Beyond the legal difficulties with mandatory, or even voluntary, three-way agreements and secondary auctions, the implementation of these arrangements raises a number of technical and practical problems. Technical difficulties will particularly arise because, under the Commission's proposal, analog television operations could be relocated to digital allotments and digital television operations could be relocated to analog allotments.¹⁰

As NAB has pointed out before,¹¹ these three-way relocation plans raise technical problems because DTV and analog stations are not comparable and DTV stations cannot easily be relocated to the allotment of an analog station (or vice versa). Any assumption that analog and digital stations may simply switch their allotments reveals a fundamental misunderstanding of the Commission's television allotment system.

The Commission has created specific tables of allotments for both NTSC (analog) channels and DTV channels. Each assignment defines the space where a station can be placed. However, the DTV table of allotments and the NTSC table of allotments were created based on different technical planning factors. As a result, a DTV station generally cannot be placed on a channel that was allotted based on NTSC planning factors, and vice versa. If, as the Commission suggests, a DTV station were to be placed on an NTSC channel (or vice versa), that DTV station

¹⁰ In this regard, the Commission noted "that different considerations arise depending on whether the relocation channel is analog or digital." Where the relocation channel is analog, the lower channel broadcaster who provides that channel would convert to DTV-only operations, thereby freeing up its analog channel for relocation by either an analog or digital incumbent from channels 59-69. Where the relocation channel is digital, the broadcaster providing the channel would retain its analog allotment, and the channel 59-69 incumbent would operate on the first operator's vacated digital channel. The Commission could then permit the lower channel broadcaster "to switch to digital transmission on its analog channel." *Further Notice* at ¶ 88.

¹¹ See Reply of NAB to Oppositions to Petition for Reconsideration at 2-3 (March 17, 2000).

would likely cause interference to other DTV and NTSC stations on both co- and adjacent channels, thereby upsetting the Commission's overall DTV allocation plan and the digital transition process.¹² In sum, these proposed three-way relocation plans are likely to prove technically challenging and quite expensive because television stations and allocations – especially between NTSC and DTV – simply are not fungible.

Given these significant technical and cost questions associated with three-way agreements generally, NAB questions the utility of allowing incumbents on channels 59-69 to relocate temporarily on channels vacated by broadcasters on channels 52-58. *See Further Notice* at ¶ 89. Such relocations would constitute stop-gap measures at best, because channels 52-58 are subject to future licensing for other services. Approving three-way arrangements resulting in the temporary relocation of broadcasters on channels 59-69 to *non-core* channels would likely produce significant inefficiencies (including duplicative relocation costs and consumer confusion), rather than a smoother transition to digital broadcasting. *See Further Notice* at ¶ 53 (asserting that voluntary agreements between incumbent broadcasters and new 700 MHz licensees will generally aid in “achieving an orderly DTV transition”).

¹² To make a DTV station “fit” into an analog channel allocation, for example, the power and therefore the coverage area of the station would have to be completely re-engineered. In addition, the station being relocated to an analog channel allotment would likely have to replace its transmitter, transmission line and antenna to operate on this new channel. These same problems would occur if NTSC stations were to relocate to digital channels. This risk of upsetting the Commission's carefully formulated digital table of allotments would appear to be especially high where the relocation channel is digital, and the channel 59-69 broadcaster (who may likely be analog) would begin operations on the digital channel vacated by the lower channel broadcaster, who would then be permitted “to switch to digital transmission on its analog channel on a date certain.” *Further Notice* at ¶ 88.

III. The Commission Should Not Mandate Cost Sharing.

Because the Commission should not go any further than approval of wholly voluntary agreements, NAB agrees with that “it would not be necessary or appropriate to adopt cost-sharing rules.” *Further Notice* at ¶ 82. The Commission “should rely on market forces to produce any desirable cost-sharing relationships” among the new 700 MHz licensees. *Id.* at ¶ 83. In this regard, NAB sees no reason for the Commission to intervene in the market to determine the “overall costs” 700 MHz licensees would be required to share, which licensees “should be required to pay,” or whether a “cap” should be placed on “the amount of shared costs.” *Id.* at ¶ 84. There is no reason for the Commission to interfere in the functioning of the market by artificially capping the amount that new 700 MHz licensees may freely choose to offer incumbent broadcasters, if they believe that it furthers their commercial self-interest to do so. Imposing any such artificial limits would merely attempt to favor the new 700 MHz licensees at the expense of incumbent broadcasters who have made very substantial investments in their existing broadcast operations on channels 59-69.

IV. Conclusion

The Commission has contended that facilitating arrangements resulting in the early clearing of the 700 MHz band by incumbent broadcasters will not only promote the development of new wireless services in the band, but will also assist the transition to DTV by providing resources for broadcasters to build their digital facilities. *See Memorandum Opinion* at ¶ 53. NAB believes that this argument shows a misunderstanding of the nature of the DTV transition. As Congress has clearly specified, the speed of the transition must be measured not in terms of when television stations begin transmitting in a digital format, but instead by the level of consumer acceptance of digital receivers. *See* 47 U.S.C. § 309(j)(14)(B).

NAB accordingly reminds the Commission again that it can best promote an expeditious conclusion to the DTV transition, as well as the deployment of new wireless services in the 700 MHz band, only by acting promptly on significant matters directly relating to DTV.¹³ As Commissioner Ness pointed out, the Commission is “holding back from addressing the critical issues that relate to this transition.” *Further Notice*, Separate Statement of Commissioner Ness; *see* Separate Statement of Commissioner Furchtgott-Roth (“Delay, coupled with incremental declarations aimed at advancing other policy goals, is no way to address the core legal issues inherent in the digital television transition”). Without Commission action on these vital issues, the transition to DTV will without doubt extend well beyond 2006, thereby frustrating the development of new wireless services in the 700 MHz band.

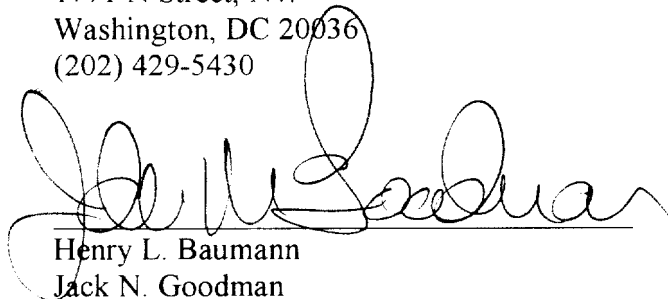
¹³ In particular, the Commission must act to adopt must carry regulations for DTV signals and implement technical standards for making digital televisions compatible with cable systems.

The Commission must realize that the band-clearing mechanisms it has suggested in the *Further Notice* will not, in the absence of action on issues vital to the overall digital transition, be effective in speeding the return of analog broadcast channels (including channels 59-69) and the deployment of new wireless services in the 700 MHz band.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430

A handwritten signature in black ink, appearing to read "H. L. Baumann", written over a horizontal line.

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

Kelly T. Williams
Director of Engineering
NAB Science and Technology

August 16, 2000